Feb 13 1872
in Error
Assignments 10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~318~~ 119

CHARLES REICHE AND HENRY REICHE, PLAINTIFFS IN ERROR,

vs.

HENRY A. SMYTHE, COLLECTOR OF NEW YORK, ETC.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 30, 1870.

Feb 14 1872
Argued
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SUPREME COURT OF THE UNITED STATES.

No. 318.

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INDEX.

	Original.	Print.
Writ of error	1	1
Statement of facts	3	2
Declaration	13	5
Bill of particulars	16	7
Stipulation to waive jury	21	8
Defendant's plea	22	9
Agreed facts	23	9
Judgment	33	12
Assignment of error	35	12
Joinder in error	37	13
Bond	38	13
Citation and service	40	14

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles Reiche and Henry Reiche, plaintiffs in error, and Henry A. Smythe, defendant in error, a manifest error hath happened to the great damage of the said plaintiffs, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this sixth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the United States the ninety-fourth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 U. S. circuit court, southern dist. of New York.

CHARLES REICHE AND HENRY REICHE, PL'FFS in error,
vs.
HENRY A. SMYTHE, COLLECTOR, &C., DEF'T in error.

I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to fifty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles Reiche & Henry Reiche, pl'ffs in error, and Henry A. Smythe, collector, &c., def't in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said circuit court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 23d day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-c't int. rev. stamp affixed and canceled.]

Allowed Nov'r 2nd, 1870.

L. B. WOODRUFF, *Circuit J.*

Filed Nov. 2, 1870.

3 United States circuit court, southern district of New York.

CHARLES REICHE AND HENRY REICHE
vs.
HENRY A. SMYTHE, COLLECTOR, &C.

Statement of facts.

This action was commenced in February, 1867, in the supreme court of the State of New York, to recover duties paid by the plaintiff to the defendant, and alleged to have been illegally exacted, and was removed by certiorari to this court.

The defendant was, at the time the alleged illegal exactions were made and paid, and at the time when this suit was brought, collector of the customs of the United States at the port of New York, and in making such exactions and receiving such payments, acted under the directions of the Secretary of the Treasury.

The plaintiffs imported, in 1866, in the steamer Hansa, from Bremen, 700 canary birds, 225 goldfinches, 4 pheasants, and one lispert; an entry thereof, in writing, was made and filed with the defendant, as said collector, on the 2d day of January, 1867, and a duty of twenty per cent. ad valorem was imposed upon the said birds by the said collector, amounting to the sum of $54 60, which sum was, by the
4 said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the said 2d day of January, and on the 7th day of January, 1867, gave notice in writing to the said defendant of their dissatisfaction with his decision, by filing a protest, of which a copy is annexed hereto, marked "A." On the 29th day of January, 1867, the plaintiffs appealed from the said decision of the defendant to the Secretary of the Treasury, and on the 4th day of February, 1867, the said Secretary affirmed the defendant's decision.

The plaintiffs also, in the year 1866, made another importation by the steamer "America," of 500 canary birds, 70 goldfinches, 6 pheasants, 4 chickens, two pelicans, one lispert, and one marlow. Entry thereof, in writing, was made and filed with the defendant, as said collector, on the 15th day of October, 1866, and a duty of twenty per cent. ad valorem was imposed upon the said birds by the defendants, amounting to $45 00, which sum was by the said defendant required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the sum on the 15th day of October, 1866, and on the 16th of the same month gave notice, in writing, to the defendant, of their dissatisfaction with his decision by filing a protest, of which a copy is annexed hereto, marked "B." On the 26th day of October, 1866, the plaintiffs appealed to the Secretary of the Treasury from the said decision of the defendant, and on the 2d day of November, 1866, the said Secre-
5 tary affirmed the decision of the defendant.

The plaintiffs also, in the year 1866, made another importation by the steamer "Hansa," from Bremen, of 650 canary birds, two storks, twenty pheasants, ten parrots, fifteen paroquets, & 15 African sparrows. An entry thereof was made and filed with the defendant, as said collector, on the 27th day of September, 1866, and a duty of twenty per cent. ad valorem was imposed upon the said birds by the said defendant, amounting to $108 00, which sum was, by the said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the said 27th day of Septem-

ber, and on the 9th day of October, 1866, gave notice, in writing, to the said defendant, of their dissatisfaction with his decision, by filing a protest, of which a copy is annexed hereto, marked "C;" on the 17th day of October, 1866, the plaintiffs appealed from the decision of the defendant to the Secretary of the Treasury, and on the 8th day of January, 1867, the said Secretary affirmed the decision of the *of the* defendant.

The plaintiffs also, in the year 1866, imported from Bremen, by the steamer "New York," 715 canary birds and eight parrots. An entry thereof was made and filed with the defendant, as said collector, on the 5th day of October, 1866, and a duty of twenty per cent. ad valorem was imposed upon the same by the defendant, amounting to
6 $54 40, which sum was, by the said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the 5th day of October, 1866, and on the 9th day of October, 1866, gave notice, in writing, to the said defendant of their dissatisfaction with his decision, by filing a protest, of which a copy is hereto annexed, marked "D." On the 17th day of October, 1866, more than ninety days before the commencement of this action the plaintiffs appealed from the decision of the defendant to the Secretary of the Treasury, but no decision was received from the said Secretary within ninety days thereafter.

The defendant admits the receipt of the sums hereinbefore enumerated, amounting to $262 00 in coin, and he also admits the timeliness, regularity, and sufficiency of protest, appeal, and commencement of suit, and due service ot the bill of particulars required by law, and that, if the court shall be of the opinion that the said importations were not, by law, liable to duty, the plaintiffs are entitled to judgment for the said sum of $262 00, with interest and costs.

All the importations in question were living when the entries were made.

We agree that the facts in this case are as above stated.

EDWARDS PIERREPONT, *U. S. Att'y.*
By W. STANLEY.
B. L. LUDINGTON, *Pl'ffs' Att'y.*

7 "A."

NEW YORK, *Jan'y 6th*, 1867.

Hon. H. A. SMYTHE,
Collector of the port of New York:

We do hereby protest against the payment of 20 % duty charged on a lot of birds imported by us, contained in an entry made at the New York custom-house, on the 2d day of January, 1867, per the steamer Hansa, from Bremen, claiming that, under existing laws, said birds are exempt and free of duty, because the law of 1866, imposing a duty of 20 % on living animals of all kinds, does not include birds, the previous laws of Congress having considered and classified birds as separate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St., New York.*

"A."]

8 "B."

NEW YORK, *Oct'r 16th*, 1866.

To Hon. H. A. SMYTHE,
Collector of the port of New York.

SIR: We hereby protest against the payment of 20 % duty on a lot of birds imported by us, contained in an entry made at the custom-house, on the 15th day of Oct., 1866, per the st'r America, claiming that, under existing laws, said birds are exempt and free of duty, because the laws of 1866, imposing a duty of 20 % on all living animals of all kinds, does not include birds; the previous laws of Congress having considered and classified birds as separate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St., N. Y.*

"B."]

9 "C."

NEW YORK, *Oct. 6th*, 1866.

Hon. H. A. SMYTHE.

SIR: We do hereby protest against the payment of 20 % duty charged on a lot of birds imported by us, contained in an entry made at the custom-house, on the 27th Sept., 1866, per the steamer Hansa, claiming that, under existing laws, said birds are exempt and free of duty, because the law of 1866, imposing a duty of 20 % on living animals of all kinds does not include birds; the previous laws of Congress having considered and classified birds as separate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chambers St.*

"C."]

10 "D."

NEW YORK, *Oct.* 6, 1866.

Hon. H. A. SMYTHE.

SIR: We do hereby protest against the payment of 20 % duty charged on a lot of birds imported by us, contained in an entry made at the custom-house, on the 5th day of Oct., 1866, per the steamer New York, claiming that, under existing laws, said birds are exempt and free of duty, because the law of 1866, imposing a duty of 20 % on living animals of all kinds does not include birds; the previous laws of Congress having considered and classified birds as separate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St., N. Y.*

11 (Endorsed:) U. S. circuit court, southern district of New York.

Charles Reiche and Henry H. Reiche vs. Henry A. Smythe, collector, &c. Case. Edwards Pierrepont, U. S. att'y.

Judgment ordered for the defendant with costs.

L. B. WOODRUFF,
Circuit Judge.

Filed May 9th, 1870.

12 U. S. circuit court for the southern district of New York.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, of the term of October, 1869, to wit, of the 20th day of December, in the year of our Lord one thousand eight hundred and sixty-nine.

Witness the Honorable Lewis B. Woodruff, one of the judges of said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that, heretofore, to wit, on the 10th day of December, 1869, in October term of the same year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came Charles Reiche and Henry Reiche, by B. L. Ludington, their attorney, and brought into the said court, before the aforesaid judges thereof then there, their certain declaration against Henry A. Smythe, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

13 U. S. circuit court.

CHARLES REICHE & HENRY REICHE
vs.
HENRY A. SMYTHE.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The aboved-named plaintiffs come here into court, and by B. L. Ludington, their attorney, suggest and give the court now here to understand and be informed that, heretofore, to wit, on the 28th day of January last past, an action was commenced in the supreme court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was duly served upon the defendant herein in the said supreme court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had, that afterwards, and on the 4th day of March, in the year of our Lord one thousand eight hundred and sixty-seven, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such cases made and provided; and the clerk of the said supreme court did thereupon return the said writ with the summons aforesaid, and did file the

same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 28th day of January, one thousand eight hundred and sixty-seven, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended, for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit: on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of three hundred dollars, of lawful money as aforesaid. And being so found in arrear, and indebted to the said plaintiffs, the said defendant in the consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay
14 unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.,) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of three hundred dollars, and thereof the plaintiffs bring suit, &c.

B. L. LUDINGTON,
Attorney for Plaintiffs.

15 *Bill of particulars.*

Name of importer or importers.....Charles Reiche & Henry Reiche.
Description of merchandise and
place from which imported.....Live canary birds; Bremen.
Name of vessel.....Hansa.
Date of invoice.....No invoice.
Date of entry at custom-house.....Jan'y 2, 1867.

Precise amount of duty claimed to have been exacted in excess.....$54 60.
Date of payment of said duties.....Jan'y 2, 1867.
Day and year in which protest was filed against the exaction thereof.....Jan'y 2, 1867.
Date of appeal thereon to Secretary of Treasury.....Jan'y 29, 1867.
Date of decision on such appeal.....Feb'y 4, 1867.

16 *Bill of particulars.*

Name of importer or importers.....Charles Reiche & Henry Reiche.
Description of merchandise and place from which imported.....Live canary birds; Bremen.
Name of vessel.....America.
Date of invoice.....No invoice.
Date of entry at custom-house.....Aug't 27, 1866.
Precise amount of duty claimed to have been exacted in excess.....$45.
Date of payment of said duties.....Aug't 27, 1866.
Day and year in which protest was filed against the exaction thereof.....Oct. 16, 1866.
Date of appeal thereon to Secretary of Treasury.....Oct. 17th, 1866.
Date of decision on such appeal.....Nov. 2, 1866.

17 *Bill of particulars.*

Name of importer or importers.....Charles Reiche & Henry Reiche.
Description of merchandise and place from which imported.....Live canary birds; Bremen.
Name of vessel.....New York.
Date of invoice.....No invoice.
Date of entry at custom-house.....Oct. 5, 1866.
Precise amount of duty claimed to have been exacted in excess.....$54 40.
Date of payment of said duties.....Oct. 5, 1866.
Day and year in which protest was filed against the exaction thereof.....Oct. 8, 1866.
Date of appeal thereon to Secretary of Treasury.....Oct. 17, 1866.
Date of decision on such appeal.....No decision.

18 *Bill of particulars.*

Name of importer or importers.....Charles Reiche & Henry Reiche.
Description of merchandise and place from which imported.....Live canary birds; Bremen.
Name of vessel.....Hansa.
Date of invoice.....No invoice.
Date of entry at custom-house.....Sept. 27th, 1866.
Precise amount of duty claimed to have been exacted in excess.....$108.

Date of payment of said duties.....Sept. 27, 1866.
Day and year in which protest was filed against the exaction thereof.....Oct. 8th, 1866.
Date of appeal thereon to Secretary of Treasury.....Oct. 17, 1866.
Date of decision on such appeal.....Jan'y 8, 1867.

19 U. S. circuit court, southern district of New York.

CHARLES REICHE AND HENRY REICHE
against
HENRY A. SMYTHE, COLLECTOR OF CUSTOMS of the United States at the port of New York.

SIR: Please to take notice that the following is the bill of particulars of items of the plaintiffs' demand in the above-entitled action, to wit, moneys exacted by compulsion and duress, and under color of the revenue law of the United States, by the defendant, as collector as aforesaid, from and paid by the plaintiff on certain live canary birds particularly described in the bill of particulars hereto annexed, with legal interest on said amounts from date of payment thereof as aforesaid.

Dated New York, April 20th, 1867.

Yours, &c.,

B. L. LUDINGTON,
Plaintiffs' Attorney, 110 *Broadway*.

S. G. COURTNEY, Esq.,
Def't's Att'y.

20 (Endorsed:) United States circuit court for southern district of New York. Charles Reiche & Henry Reiche vs. Henry A. Smythe, collector of the customs of the United States at the port of New York. Bill of particulars. B. L. Ludington, plaintiffs' attorney, 110 Broadway. To S. G. Courtney, esq., defendant's att'y. Rec'd April 20, '67.

21 U. S. circuit court.

CHARLES REICHE AND HENRY REICHE
ag'st
HENRY A. SMYTHE, COLLECTOR, &C.

We hereby stipulate and consent to waive a jury in this action, and consent that the issues may be tried by the court.

EDWARDS PIERREPONT,
U. S. Att'y.

By W. STANLEY.
B. L. LUDDINGTON,
Pl'ffs' Att'y.

(Endorsed:) U. S. circuit court. Charles Reiche et al. vs. Henry A. Smythe. Stipulation. Edwards Pierrepont, U. S. att'y. Filed April 12, 1870.

U. S. circuit court, southern district of New York.

22 MOSES H. GRINNELL *ads.* CHARLES REICHE & AL. } No. . Plea.

And the said defendant, Henry A. Smythe, by Edwards Pierrepont, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant; and of this he puts himself upon the country. And the said plaintiffs do the like, &c.

To Esq.,
Plaintiff's Attorney.

23 Therefore the issue above joined is ordered by the said court to be tried at the circuit court, appointed to be held at the United States court-buildings in the city of New York, on the 12th day of April, in the year 1870.

At which day and place, before Lewis B. Woodruff, esquire, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, come, as well the said plaintiffs as the said defendant, by their respective attorneys aforesaid; and the said attorneys having signed a stipulation waiving a trial by jury, and consenting that the said issue be tried before the judge of the said
24 court, and the said stipulation having been filed with the clerk of the said court:

It was thereupon agreed by the respective parties that the defendant was, at the time the alleged illegal transactions were made and paid, and at the time this suit was brought, collector of the customs of the United States at the port of New York, and in making such exactions and receiving such payments, acted under the directions of the Secretary of the Treasury; that the plaintiffs imported in 1866, in the steamer "Hansa," from Bremen, 700 canary birds, 225 goldfinches, 4 pheasants, and one lispre. An entry thereof, in writing, was made and filed with the defendant, as said collector, on the 2d day of January, 1867, and a duty of twenty per cent. ad valorem was imposed upon the said birds by the said collector, amounting to the sum of $54 60, which sum was, by the said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the said 2d day of January; and, on the 7th day of January, 1867, gave notice, in writing, to the said defendant of their dissatisfaction with his decision by filing a protest, of which a copy is annexed hereto, marked "A." On the 29th day of January, 1867, the plaintiffs appealed from the said decision of the defendant to the Secretary of the Treasury; and,
25 on the 4th day of February, 1867, the said Secretary affirmed the defendant's decision. The plaintiff also, in the year 1866 made another importation, by the steamer "America," of 500 canary birds, 75 goldfinches, 6 pheasants, 4 chickens, 2 pelicans, one lispre, and one marlow. Entry thereof, in writing, was made and filed with the defendant, as said collector, on the 15th day of October, 1866, and a duty of twenty per cent. ad valorem was imposed upon the said birds by the defendant, amounting to $45 00, which sum was, by the said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the 15th day of October, 1866; and,

on the 16th of the same month, gave notice, in writing, to the defendant of their dissatisfaction with his decision, by filing a protest, of which a copy is annexed hereto, marked "B." On the 26th day of October, 1866, the plaintiffs appealed to the Secretary of the Treasury from the said decision of the defendant; and, on the 2d day of November, 1866, the said Secretary affirmed the decision of the defendant. The plaintiffs also, in the year 1866, made another importation by the steamer
"Hansa," from Bremen, of 650 canary birds, two storks, 20
26 pheasants, 10 parrots, 15 parroquets, and 15 African sparrows.
An entry thereof was made and filed with the defendant, as said collector, on the 27th day of September 1866, and a duty of twenty per cent. ad valorem was imposed upon the said birds by the said defendant, amounting to $108 00, which sum was, by the said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the said 27th day of September; and, on the 9th day of October, 1866, gave notice in writing to the said defendant of their dissatisfaction with his decision, by filing a protest, of which a copy is annexed hereto, marked "C." On the 17th day of October, 1866, the plaintiffs appealed from the decision of the defendant to the Secretary of the Treasury; and, on the 8th day of January, 1867, the said Secretary affirmed the decision of the defendant. The plaintiffs also, in the year 1866, imported from Bremen, by the steamer "New York," 715 canary birds and 8 parrots. An entry thereof was made and filed with the defendant, as said collector, on the 5th day of October, 1866, and a duty of twenty per cent. ad valorem was imposed upon the
same by the defendant, amounting to $54 40, which sum was,
27 by the said defendant, required to be paid to him before he would deliver the said birds to the plaintiffs. The plaintiffs paid the said sum on the 5th day of October, 1866; and, on the 9th day of October, 1866, gave notice in writing to the said defendant of their dissatisfaction with his decision, by filing a protest, of which a copy is hereto annexed, marked "D." On the 17th day of October, 1866, more than 90 days before the commencement of this action, the plaintiffs appealed from the decision of the defendant to the Secretary of the Treasury, but no decision was received from the said Secretary within ninety days thereafter.

The defendant admits the receipt of the sums hereinbefore enumerated, amounting to $262 00 in coin, and he also admits the timeliness, regularity, and sufficiency of protest, appeal, and commencement of suit, and due service of the bill of particulars required by law; and that if the court shall be of the opinion that the said importations were not by law liable to duty, the plaintiffs are entitled to judgment for the said sum of $262 00, with interest and costs.

All the importations in question were living when the entries were made.

28 EXHIBIT A.

NEW YORK, *January* 6, 1867.

Hon. H. A. SMYTHE,
Collector of the port of New York:

We do hereby protest against the payment of 20 % duty charged on a lot of birds imported by us, contained in an entry made at the New York custom-house on the 2d day of January, 1867, per the steamer Hansa, from Bremen, claiming that, under existing laws, said birds are exempt

and free of duty, because the law of 1866, imposing a duty of 20 °/₀ on living animals of all kinds does not include birds; the previous law of Congress having considered and classified birds as seperate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St., New York.*

29

30 EXHIBIT B.

NEW YORK, *Oct'r* 16, 1866.

To Hon. H. A. SMYTHE,
Collector of the port of New York.

SIR: We hereby protest against the payment of 20 °/₀ duty on a lot of birds imported by us, contained in an entry made at the custom-house on the 15th day of October, 1866, per the st'r America, claiming that, under existing laws, said are exempt and free of duty, because the laws of 1866, imposing a duty of 20 °/₀ on all living animals of all kinds does not include birds; the previous laws of Congress having considered and classified birds as seperate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St., N. Y.*

31 EXHIBIT C.

NEW YORK, *Oct.* 6, 1866.

Hon. H. A. SMYTHE.

SIR: We do hereby protest against the payment of 20 °/₀ duty charged on a lot of birds exported by us contained in an entry made at the custom-house, on the 27th Sept., 1866, per the steamer Hansa, claiming that, under existing laws, said birds are exempt and free of duty, because the laws of 1866 imposed a duty of duty 20 °/₀ on living animals of all kinds does not include birds; the previous laws of Congress having considered and classified birds as seperate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St.*

32 EXHIBIT D.

NEW YORK, *Oct.* 6, 1866.

Hon. H. A. SMYTHE.

SIR: We do hereby protest against the payment of 20 °/₀ duty charged on a lot of birds imported by us contained in an entry made at the custom-house on the 5th day of Oct, 1866, per the steamer New York, claiming that, under existing laws, said birds are exempt and free of duty because the laws of 1866, imposing a duty of 20 °/₀ on living animals of all kinds, does not include birds; the previous laws of Congress having con-

sidered and classified birds as seperate and distinct from animals. We pay the amount exacted in order to obtain our birds, but under this protest.

Respectfully,

C. REICHE & BRO.,
55 *Chatham St., N. Y.*

Whereupon all and singular the premises aforesaid being seen and by the court here fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said defendant did not undertake and promise in manner and form, as the said plaintiffs have above complained against him:

33 Therefore, it is considered that the said plaintiffs take nothing by their said declaration, but that they be in mercy, &c. And that the said defendant do go thereof without day, &c. And it is further considered by the said court now here, that the said defendant do recover against the said plaintiffs forty-nine $\frac{47}{100}$ dollars for his costs and charges by him about his defence in this behalf laid out and expended, by the said court here adjudged to the said defendant and with his assent, according to the form of the statute in such case made and provided; and that the said defendant have execution thereof, &c.

Judgment signed this 2d day of November, 1870.

R. E. STILWELL,
Dep'y Clerk.

34 (Indorsed:) Vol. 6, page 429, U. S. circuit court. Henry A. Smythe ads. Charles Reiche et al. Judgment record. Noah Davis, attorney for defendant. Costs $10 00. Filed, Nov. 2d, 1870.

35 Supreme Court of the United States. December term, 1870.

CHARLES REICHE & HENRY REICHE, PLAINTIFFS in error,
vs.
HENRY A. SMYTHE, DEF'T IN ERROR. } In error.

Afterwards, to wit, on the first Monday of December in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs, by Frederick Chase, their attorney, and say that, in the record and proceedings aforesaid and also in giving the judgment aforesaid, there is manifest error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid in form aforesaid given, was given for the said defendant against the said plaintiffs, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs against the said defendant; and the said plaintiffs pray that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annul'ed and altogether held for nothing, and that they, the said plaintiffs, may be restored to those things which they have lost by reason of the said judgment.

FRED. CHASE,
Plaintiffs' Attorney.

36 (Endorsed:) Supreme Court U. S. Charles Reiche et al. vs. Henry A. Smythe. Assignment of error. Fred. Chase, pl'ffs' att'y. Filed, Nov. 18, 1870.

37 Supreme Court of the United States. December term, 1870.

HENRY A. SMYTHE, DEFENDANT IN ERROR,
ads.
CHARLES REICHE ET AL., PLAINTIFFS IN error. } In error.

And hereupon, afterwards, to wit, on the first Monday of December aforesaid, in this same term, comes the said defendant, by his attorney, Noah Davis, the United States district attorney for the southern district of New York, and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays that the court now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid given may be in all things affirmed.

NOAH DAVIS,
Att'y for Def't in Error.

(Endorsed:) Supreme Court of the United States. Henry A. Smythe ads. Charles Reiche et al., joinder in error. Service of a copy of within joinder in error is admitted.

FRED. CHASE,
Counsel for Pl'ffs.

Filed Nov. 18, 1870.

Bond for costs.

38 Circuit court of the United States of America for the southern district of New York, in the second circuit.

CHARLES REICHE AND HENRY REICHE, PLAINTIFFS IN ERROR,
vs.
HENRY A. SMYTHE, DEFENDANT IN ERROR.

Know all men by these presents that we, Henry Reiche, B. L. Luddington, and William Leopold, are held and firmly bound unto the above-named Henry A. Smythe, in the sum of two hundred & fifty dollars, to be paid to the said Henry A. Smythe; for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 21st day of October, in the year of our Lord one thousand eight hundred and seventy.

Whereas, the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now therefore, the condition of this obligation is such, that if the above-named plaintiffs shall prosecute said writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY REICHE. [L. S.]
B. L. LUDDINGTON. [L. S.]
WILLIAM LEOPOLD. [L. S.]

Sealed and delivered, and taken and acknowledged, this 21st day of October, 1870, before me.

JOHN A. SHIELDS,
U. S. Com'r.

39 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Benjamin L. Luddington, No. 359 Lexington av., and William Leopold, 746 East 5th street, being duly sworn, each doth depose and say that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

B. L. LUDINGTON.
WILLIAM LEOPOLD.

Sworn to this 21st day of October, A. D. 1870, before me.

JOHN A. SHIELDS,
U. S. Com'r.

(Indorsed:) Vol. page . U. S. circuit court. Charles Reiche & Henry Reiche vs. Henry A. Smythe. Bond for costs on writ of error. Fred. Chase, attorney.

Approved Nov. 2d, 1870.

L. B. WOODRUFF,
Circuit Judge.

Filed this 2d day of Nov., 1870.

40 UNITED STATES OF AMERICA, *ss:*

To HENRY A. SMYTHE, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles Reiche and Henry Reiche are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lewis B. Woodruff, circuit judge of the 2d circuit of the United States, this second day of November, in the year of our Lord one thousand eight hundred and seventy.

L. B. WOODRUFF,
Circuit Judge.

41 (Indorsed:) Supreme Court of the United States. Charles Reiche et al. vs. Henry A. Smithe, citation.

Service of a copy of within citation is admitted.
New York, Nov. 2, 1870.

NOAH DAVIS,
Att'y for Def't in Error.

Filed Nov. 21, 1870.

(Indorsement on cover:) No. 318. Charles Reiche and Henry Reiche, plaintiffs in error, vs. Henry A. Smythe, collector of New York. S. New York C. C. U. S. Filed 30th November, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

CHARLES REICHE AND HENRY REICHE, *Plaintiffs in Error,*
vs.
HENRY A. SMYTHE, *Collector of New York, &c.*
No. 119.

In error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE DEFENDANT IN ERROR

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

CHARLES REICHE AND HENRY REICHE, *Plaintiffs in Error,*
vs.
HENRY A. SMYTHE, *Collector of New York, &c.*
} No. 119.

In error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE DEFENDANT IN ERROR.

This was a suit to recover $262, in coin, alleged to have been illegally exacted by the defendant, and paid by the plaintiffs, as duties upon certain Canary and other birds, imported by the latter between the 27th of September, 1866, and the 2d of January, 1867. The action was commenced in the supreme court of the city of New York, and afterwards removed to the circuit court of the United States for the southern district of New York, where, by stipulation of the parties, a jury was waived, and the issue tried by the court upon agreed facts. Judgment was given for the defendant in November, 1870, and the plaintiffs have brought the cause to this court by writ of error.

The duties mentioned were levied and collected under the act of May 16, 1866, entitled "An act imposing a duty on live animals," (14 Stat., 48,) which was in force at the period referred to, and which provides as follows:

"That on and after the passage of this act there shall be levied, collected, and paid on all horses, mules, cattle, sheep, hogs, and other live animals imported from foreign countries, a duty of twenty per centum ad valorem: *Provided*, That any such animals now bona fide owned by resident citizens of the United States, and now in any of the provinces of British America, may be imported into the United States free of duty until the expiration of ten days next after the passage of this act."

The only question involved is, whether birds are dutiable by virtue of this act.

I.

Under the tariff act of July 30, 1846, living animals, not imported for breed, but imported for sale or public exhibition, including birds imported in quantities authorizing the belief that they were imported for sale, were considered to be "merchandise" within the meaning of the 3d section of that act, (9 Stat., 43,) and as such to be liable to the duty of 20 per centum ad valorem imposed by that section. (See Treasury circular of December 31, 1847, published in vol. 1 of Mayo's U. S. Fiscal Department, p. 404; also, Treasury Regulations of 1857, pp. 554, 555.) Animals imported for breed were exempt from duty by the express terms of the act.

Subsequently, by section 3 of the tariff act of March, 3, 1857, (11 Stat., 193,) "animals, living, of all kinds" were made exempt from duty. This provision plainly comprehended birds as well as beasts—indeed, all living creatures whatsoever; and we are not aware that it received a different interpretation.

The next legislation on the subject is contained in the 23d section of the tariff act of March 2, 1861, (12 Stat., 193,) which enumerates, among the articles declared to be exempt from duty, "animals, living, of all kinds," and also, a little farther on, "birds, singing or other, and land and water fowls."

Thus the matter stood at the time of the passage of the act of May 16, 1866, imposing a duty "on all horses, mules, cattle, sheep, hogs, and other live animals," under which the duties in this case were levied and collected.

It may be urged on the other side, as was done in the court below, that inasmuch as Congress, in the act of 1861, named "animals, living, of all kinds," and in the same section also mentioned "birds, singing and other," &c., the intention was to recognize a restricted meaning of the word "animals," as not including "birds," and to introduce and sanction such restricted meaning as a definition of the terms "living animals" and "live animals" when used in the revenue laws; so that when, in the act of 1866, a duty was imposed upon all live animals, without mentioning birds, the legislature must be understood to have intended that the latter should not be included, but should remain exempt.

The answer is, that the various duty acts are too full of examples of tautology and repetition to warrant such a conclusion; that they often show needless particularity in enumeration, accompanied by general terms plainly including the same things also mentioned in detail. Thus, in section 22 of the act of 1861, a duty is imposed upon "articles worn by men, women, or children, of whatever material composed," &c.; and yet, notwithstanding these comprehensive terms, there follow, in the same section, numerous particulars, already clearly embraced in those terms, as "bracelets, braids, chains, curls, ringlets, braces, suspenders, caps, hats," &c. Like repetitions are found in the 13th section of the act of July 14, 1862, (12 Stat., 555,) and in schedule C in the act of July 30, 1846, (9 Stat., 44.)

The phrase, all "other live animals," as employed in the act of 1866, is clear, comprehensive, and explicit. The addition of the designation of birds, in a single instance, in a former act, is a casual circumstance of too slight significance to warrant a practical interpolation, in the later special statute, of an exception to its plain import. And this is especially and conclusively forbidden when on recurrence to the same previous act, and to others on the same subject, similar repetitions are found pervading them all, where, obviously, there was no intent to introduce new definitions, or, by merely giving some particulars, to restrict the meaning of general terms.

Reiche *vs.* Smythe, 7 Bl. C. C. R., 235.

II.

Taking the language of the act of 1866 in its usual and ordinary signification, there is no room for doubt that live birds, as well as other living animals, fall within its purview, and are subject to duty. The act in substance declares that all horses, all mules, all cattle, all sheep, all hogs, and *all other live animals*, imported from abroad, shall be liable to duty. Terms more general and comprehensive than "all other live animals" cannot well be conceived; their plain and natural import being, all other living things endowed with sensation and the power of motion. The legislature must be understood to have intended to include in the act, as a dutiable subject, what is fairly comprised in the terms of the act.

B. H. BRISTOW,
Solicitor General.
C. H. HILL,
Assistant Attorney General.

Supreme Court of the United States.

DECEMBER TERM, 1870.

REICHE *et al.*
vs.
SMYTHE.
} In Error. No. 318.

PLAINTIFFS' BRIEF AND POINTS.

Plaintiffs imported at the port of New York, subsequent to May 16, 1866, certain living birds and fowls.

Defendant, then collector of customs of the United States, exacted a duty of twenty per centum, *ad valorem*, thereon, under color of the act of May 16, 1866, ch. 82, (14 Stats., 48,) which said duty was paid by plaintiffs under compulsion, accompanied by due legal protest and appeal; and, the decision of the Secretary of the Treasury being adverse to plaintiffs, they brought suit against the defendant within the time limited by law.

The cause was tried in the New York circuit court for the southern district of New York, upon an agreed statement of facts, without a jury, under stipulation of counsel that judgment should be rendered for plaintiffs if the court should be of the opinion that living birds and fowls were by law exempt from duty. The circuit court held that living birds and fowls were not by law exempt from duty, and accordingly rendered judgment for defendant.

Plaintiffs maintain that the court below erred in that construction of the law, and that judgment should have been for plaintiffs.

The 23d section of the act of March 2, 1861, ch. 68, (12 Stats., 193,) provides, that—

* * "the importation of the articles hereinafter mentioned and embraced in this section shall be exempt from duty."

* * * * * *

"Animals living of all kinds."

* * * * * *

"Birds, singing and other, and land and water fowls."

* * * * * *

This provision is still in force, unless repealed by the act of May 16, 1866, ch. 82, (14 Stats., 48,) which provides—

"That on and after the passage of this act there shall be levied, collected, and paid, on all horses, mules, cattle, sheep, hogs, and other live animals imported from foreign countries, a duty of twenty per centum, *ad valorem: Provided*, That any such animals now *bona fide* owned by resident citizens of the United States, and now in any of the provinces of British America, may be imported into the United States free of duty, until the expiration of ten days next after the passage of this act."

The special enumeration of "birds," &c., in the act of 1861, and "horses, mules, cattle, sheep, and hogs" in the act of 1866, the court below *rejected as "tautological."*

See report of case, 7 Blatchf., 235.

FIRST POINT.

1. Under the act of 1861, above cited, (leaving out of view the act of 1866,) "*birds and fowls*" were free from duty, by virtue of the special enumeration of them, *eo nomine*, in the free list of the statute, and not under the general term animals; for, if otherwise, the distinct enumeration of them would have been superfluous and unmeaning.

2. The term "animals," therefore, *for the purposes of that act*, (viz, the act of 1861,) did not include birds and fowls in its signification, they being otherwise provided for in the same act *eo nomine*.

In the construction of statutes, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

Dwarris on Stats., p. 658. See also *ib.*, pp. 699, 703, 705, 763, 765.

Blackstone Comm., vol. 1, p. 89.

Bacon's Abr., Stat. I, 2.

This court has declared itself "not competent to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."

Rice *v.* RR. Co., 1 Black, 358, 379.

"That a law is the best expositor of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the act, are among those plain rules, laid down by common sense for the exposition of statutes, which have been uniformly acknowledged."

Pennington *v.* Coxe, 2 Cranch, 33, 52.

"It is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can properly be done, and thus preserve the harmony of all the provisions."

Bend *v.* Hoyt, 13 Peters, 263, 272.

In Strode *v.* Stafford Justices, 1 Brock., 162, 165, Chief Justice Marshall calls these principles "axioms."

Harrison *v.* Vose, 9 Howard, 372, 380.

Stuart *v.* Maxwell, 16 Howard, 150, 163.

Ogden *v.* Strong, 2 Paine, 584, 587.

Kent's Comm., vol. 1, p. 461, 462.

"Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature."

Wilkinson *v.* Leland, 2 Peters, 627, 662.

"If it appears by the act itself that a particular meaning was intended by the terms used, then that particular meaning should be adopted in giving construction to the act, whatever the commercial meaning of the terms may have been."

When an article is provided for in a tariff act by name, "no subsequent general provision, even if it were without qualification, would include it."

Roosevelt *v.* Maxwell, 3 Blatchf., 391, 395.
Bacon's Abr., I, 2.

See also De Forest *v.* Lawrence, 13 Howard, 274, 282.
Elliott *v.* Swartwout, 10 Peters, 137, 152.

SECOND POINT.

1. The act of 1866, above cited, nowhere alludes to birds or fowls by *name*, and contains no negative words. The word animal is a general term, including in its signification, when unlimited, many creatures besides birds and fowls, but capable of being used in many limited senses. Every word of the act of 1866 has ample food, if birds and fowls be excluded from its operation.

That act cannot then imply any repeal of the particular exemption conferred on birds and fowls by name by the act of 1861.

2. The acts of 1861 and 1866 are *in pari materia;* and the act of 1861 having, for revenue purposes, impressed upon the term "*animals*" a special meaning, as above shown, *excluding birds and fowls*, the same word, when used in the act of 1866, must be presumed to have the same signification, unless therein otherwise defined.

"A general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts be irreconcilably inconsistent."

Sedgwick Stat. and Cons. Law, pp. 123, 127.
Dwarris on Stats., p. 674.

To work a repeal by implication, the inference must be "*necessary* and unavoidable."

McCool *v.* Smith, 1 Black, 459, 470, 471.

"Especially in the revenue laws, there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

Woods *v.* The United States, 16 Peters, 342, 363.
Stuart *v.* Maxwell, 16 Howard, 150.
United States *v.* Walker, 22 Howard, 299, 311.
Morlot *v.* Lawrence, 1 Blatchf., 608, 612.

Tariff acts are all *in pari materia.*

Stuart *v.* Maxwell, 16 Howard, 150, 160.
Pennington *v.* Coxe, 2 Cranch, 33, 58.

"Where acts are *in pari materia*, if the same word be used in both statutes, a distinction made in the one is a legislative exposition of the sense in which it is to be understood in the other."

Dwarris on Stats., p. 701, 765, 766.

"It is not to be presumed that Congress, when it substitutes the provisions of one (revenue) act for another, intends to use terms in a sense different from that which had been used in prior acts. If Congress did so intend, it must be shown."

Roosevelt *v.* Maxwell, 3 Blatch., 391, 395.

An article having been identified by a given designation for revenue purposes, distinct from the general class to which it might otherwise be assigned, it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not.

De Forest *et al. v.* Lawrence, 13 Howard, 274, 282.
See also Elliott *v.* Swartwout, 10 Pet., 137, 152.
United States *v.* 51 Bales Goats' Hair, 2 Benedict, 479.

THIRD POINT.

But the act of 1866 itself, instead of enlarging the definition of the term animals, makes use of it in a still narrower and more restricted sense, excluding from its signification, as there used, all animals not *ejusdem generis* with "horses, mules, cattle, sheep, and hogs."

The extent of the expression, "other live animals," used in that connection, is restricted to other *domestic quadrupeds*. (Such as, *e. g.*, goats and asses,) conformably to the maxim *noscitur a sociis.*

"Where several words, preceding a general word, point to a confined meaning, the general word shall not have such a meaning as to extend its effect beyond subjects *ejusdem generis.*"

Chitty on Contracts, p. 90.
Sedgwick Stat. and Cons. Law, p. 423.
Sandiman *v.* Breach, 7 B. & C., 96.
Queen *v.* Nevill, 55 E. C. L., 452.
Casper *v.* Holmes, 2 B. & Ad., 592.
Chegary *v.* The Mayor, 3 Kernan, (N. Y.,) 220, 229.
Adams *v.* Bancroft, 3 Sumner, 384, 386.
United States *v.* Twenty-four Coils Cordage, 1 Baldwin, 502, 506.
United States *v.* Weise, 2 Wallace, Jr., 72, 77.
Bend *v.* Hoyt, 13 Peters, 263, 271, 272.

See also The Matilda A. Lewis, (5 Blatchf., 520,) where the meaning of this same word, "animals," was in question.

But the act of 1866 itself goes further, and, by the use of the relative "such," in the proviso, affords evidence of active intention on the part of the legislature to include within its operation none but animals of like characteristics with those specified by name in the enacting clause.

Dwarris on Stats., p. 705.

The purpose and reason of the act of 1866, and the mischief intended to be remedied by it, point also to the same confined meaning.

The reciprocity treaty with Great Britain had been terminated in March, 1866, in order to retaliate upon the Canadas for their co-operation with the rebellion, and the act of May 16, 1866, was passed in simple furtherance of that object, and with special reference to domestic animals of the kinds named. Not only may this be gathered from the proviso of the act itself, but it was explicitly announced at the time of the passage of the law. (See Cong. Globe, 1865–'66, vol. 3, pp. 2156, 2181, 2520.)

FOURTH POINT.

Finally, "it is a well-settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language," and "laws which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed."

Dwarris on Stats., p. 749.

Adams *v.* Bancroft, 3 Sumner, 384, 387.

Powers *v.* Barney, 5 Blatchf., 202.

FREDERIC CHASE,
Counsel for Plaintiffs in Error.